

AMENDED IN ASSEMBLY JUNE 17, 2004

AMENDED IN ASSEMBLY JUNE 9, 2004

**SENATE BILL**

**No. 1457**

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**Introduced by Senator Murray**

February 19, 2004

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An act to amend ~~Sections 17529.1, 17529.5, and 17529.8 of, and to add Section 17529.6 to, Section 17529.5 of~~ the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1457, as amended, Murray. Commercial e-mail advertisements.

Existing state law prohibits a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for purposes of the initiation or advertisement in an unsolicited commercial e-mail advertisement sent from California or to a California e-mail address. Existing state law also prohibits a person or entity from advertising in a commercial e-mail advertisement that is sent either from California or to a California e-mail address if the e-mail contains or is accompanied by ~~a 3rd party's~~ *3rd-party's* domain name without permission or with falsified, misrepresented, obscured, or forged header information, or if the e-mail has a misleading subject line. Existing state law authorizes the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of these prohibitions, the e-mail service provider, or the Attorney General to bring an action to recover actual damages, and authorizes a court to award reasonable attorney's fees and costs to a prevailing plaintiff. A violation of the provisions governing advertising is a misdemeanor.

This bill would ~~define commercial e-mail advertisements to include both solicited and unsolicited advertisements. The bill would limit the prohibitions regarding use of 3rd-party domain names, falsified, misrepresented, or forged header information, and misleading subject lines only to unsolicited commercial e-mail, and would delete the prohibition against obscured header information.~~

~~This bill would prohibit a person or entity from initiating or advertising in any commercial e-mail advertisement either sent from California or sent to a California e-mail address if the e-mail or an attachment to the e-mail contains or is accompanied by false, misrepresented, forged, or misleading information or a statement that includes deceptive information regarding the authorization by the recipient to send commercial e-mail advertisements or regarding opting out of receiving future commercial e-mail advertisements.~~

~~The~~ The bill would authorize the recipient of an e-mail advertisement transmitted in violation of ~~the new prohibitions~~ *these provisions*, the e-mail service provider, or the Attorney General to bring an action to recover actual damages and liquidated damages of \$1,000 per e-mail advertisement transmitted in violation of the provisions, up to \$1,000,000 per incident, subject to reduction by the court, and would authorize the award of reasonable attorney's fees and costs to a prevailing plaintiff. *The bill would prohibit an action from being brought under both this damages provision and other existing damages provisions relating to e-mail advertisements for the same e-mail transmission.*

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 ~~SECTION 1. Section 17529.1 of the Business and Professions~~
- 2 ~~Code is amended to read:~~

1 ~~17529.1. For the purpose of this article, the following~~  
2 ~~definitions apply:~~

3 ~~(a) “Advertiser” means a person or entity that advertises~~  
4 ~~through the use of commercial e-mail advertisements.~~

5 ~~(b) “California electronic mail address” or “California e-mail~~  
6 ~~address” means any of the following:~~

7 ~~(1) An e-mail address furnished by an electronic mail service~~  
8 ~~provider that sends bills for furnishing and maintaining that e-mail~~  
9 ~~address to a mailing address in this state.~~

10 ~~(2) An e-mail address ordinarily accessed from a computer~~  
11 ~~located in this state.~~

12 ~~(3) An e-mail address furnished to a resident of this state.~~

13 ~~(c) “Commercial e-mail advertisement” means any electronic~~  
14 ~~mail message, whether solicited or unsolicited, that is initiated for~~  
15 ~~the purpose of advertising or promoting the lease, sale, rental, gift~~  
16 ~~offer, or other disposition of any property, goods, services, or~~  
17 ~~extension of credit.~~

18 ~~(d) “Direct consent” means that the recipient has expressly~~  
19 ~~consented to receive e-mail advertisements from the advertiser,~~  
20 ~~either in response to a clear and conspicuous request for the~~  
21 ~~consent or at the recipient’s own initiative.~~

22 ~~(e) “Domain name” means any alphanumeric designation that~~  
23 ~~is registered with or assigned by any domain name registrar as part~~  
24 ~~of an electronic address on the Internet.~~

25 ~~(f) “Electronic mail” or “e-mail” means an electronic~~  
26 ~~message that is sent to an e-mail address and transmitted between~~  
27 ~~two or more telecommunications devices, computers, or~~  
28 ~~electronic devices capable of receiving electronic messages,~~  
29 ~~whether or not the message is converted to hard copy format after~~  
30 ~~receipt or is viewed upon transmission or stored for later retrieval.~~  
31 ~~“Electronic mail” or “e-mail” includes electronic messages that~~  
32 ~~are transmitted through a local, regional, or global computer~~  
33 ~~network.~~

34 ~~(g) “Electronic mail address” or “e-mail address” means a~~  
35 ~~destination, commonly expressed as a string of characters, to~~  
36 ~~which electronic mail can be sent or delivered. An “electronic mail~~  
37 ~~address” or “e-mail address” consists of a user name or mailbox~~  
38 ~~and a reference to an Internet domain.~~

39 ~~(h) “Electronic mail service provider” means any person,~~  
40 ~~including an Internet service provider, that is an intermediary in~~

1 ~~sending or receiving electronic mail or that provides to end users~~  
2 ~~of the electronic mail service the ability to send or receive~~  
3 ~~electronic mail.~~

4 (i) ~~“Initiate” means to transmit or cause to be transmitted a~~  
5 ~~commercial e-mail advertisement or assist in the transmission of~~  
6 ~~a commercial e-mail advertisement by providing electronic mail~~  
7 ~~addresses where the advertisement may be sent, but does not~~  
8 ~~include the routine transmission of the advertisement through the~~  
9 ~~network or system of a telecommunications utility or an electronic~~  
10 ~~mail service provider through its network or system.~~

11 (j) ~~“Incident” means a single transmission or delivery to a~~  
12 ~~single recipient or to multiple recipients of a commercial e-mail~~  
13 ~~advertisement containing substantially similar content.~~

14 (k) ~~“Internet” has the meaning set forth in paragraph (6) of~~  
15 ~~subdivision (e) of Section 17538.~~

16 (l) ~~“Preexisting or current business relationship,” as used in~~  
17 ~~connection with the sending of a commercial e-mail~~  
18 ~~advertisement, means that the recipient has made an inquiry and~~  
19 ~~has provided his or her e-mail address, or has made an application,~~  
20 ~~purchase, or transaction, with or without consideration, regarding~~  
21 ~~products or services offered by the advertiser.~~

22 ~~Commercial e-mail advertisements sent pursuant to the~~  
23 ~~exemption provided for a preexisting or current business~~  
24 ~~relationship shall provide the recipient of the commercial e-mail~~  
25 ~~advertisement with the ability to “opt out” from receiving further~~  
26 ~~commercial e-mail advertisements by calling a toll-free telephone~~  
27 ~~number or by sending an “unsubscribe” e-mail to the advertiser~~  
28 ~~offering the products or services in the commercial e-mail~~  
29 ~~advertisement. This opt-out provision does not apply to recipients~~  
30 ~~who are receiving free e-mail service with regard to commercial~~  
31 ~~e-mail advertisements sent by the provider of the e-mail service.~~

32 (m) ~~“Recipient” means the addressee of a commercial e-mail~~  
33 ~~advertisement. If an addressee of a commercial e-mail~~  
34 ~~advertisement has one or more e-mail addresses to which a~~  
35 ~~commercial e-mail advertisement is sent, the addressee shall be~~  
36 ~~deemed to be a separate recipient for each e-mail address to which~~  
37 ~~the e-mail advertisement is sent.~~

38 (n) ~~“Routine transmission” means the transmission, routing,~~  
39 ~~relaying, handling, or storing of an electronic mail message~~  
40 ~~through an automatic technical process. “Routine transmission”~~

1 shall not include the sending, or the knowing participation in the  
2 sending, of commercial e-mail advertisements.

3 (o) ~~“Unsolicited commercial e-mail advertisement” means a~~  
4 ~~commercial e-mail advertisement sent to a recipient who meets~~  
5 ~~both of the following criteria:~~

6 ~~(1) The recipient has not provided direct consent to receive~~  
7 ~~advertisements from the advertiser.~~

8 ~~(2) The recipient does not have a preexisting or current~~  
9 ~~business relationship, as defined in subdivision (l), with the~~  
10 ~~advertiser promoting the lease, sale, rental, gift offer, or other~~  
11 ~~disposition of any property, goods, services, or extension of credit.~~

12 ~~SEC. 2.~~

13 *SECTION 1.* Section 17529.5 of the Business and Professions  
14 Code is amended to read:

15 17529.5. (a) It is unlawful for any person or entity to initiate  
16 or advertise in ~~an unsolicited~~ a commercial e-mail advertisement  
17 either sent from California or sent to a California electronic mail  
18 address under any of the following circumstances:

19 ~~(a)~~

20 (1) The e-mail advertisement contains or is accompanied by a  
21 third-party’s domain name without the permission of the third  
22 party.

23 ~~(b)~~

24 (2) The e-mail advertisement contains or is accompanied by  
25 falsified, misrepresented, or forged header information.  
26 ~~This subdivision~~ *This subdivision* does not apply to truthful  
27 information used by a third party who has been lawfully authorized  
28 by the advertiser to use that information.

29 ~~(c)~~

30 (3) The e-mail advertisement has a subject line that a person  
31 knows would be likely to mislead a recipient, acting reasonably  
32 under the circumstances, about a material fact regarding the  
33 contents or subject matter of the message.

34 ~~SEC. 3.~~ Section 17529.6 is added to the Business and  
35 Professions Code, to read:

36 17529.6. It is unlawful for any person or entity to initiate or  
37 advertise in a commercial e-mail advertisement either sent from  
38 California or sent to a California electronic mail address under  
39 either of the following circumstances:

~~(a) The e-mail advertisement, or an attachment to the advertisement, contains or is accompanied by false, misrepresented, forged, or misleading information.~~

~~(b) The e-mail advertisement, or an attachment to the advertisement, is accompanied by a statement that includes deceptive information regarding either:~~

~~(1) Authorization by the recipient to send commercial e-mail advertisements to that recipient.~~

~~(2) Opting out of receiving future commercial e-mail advertisements.~~

~~SEC. 4. Section 17529.8 of the Business and Professions Code is amended to read:~~

~~17529.8. (a) (1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an e-mail advertisement transmitted in violation of this article, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this article to recover either or both of the following:~~

~~(A) Actual damages.~~

~~(B) Liquidated damages of one thousand dollars (\$1,000) for each e-mail advertisement transmitted in violation of this article, up to one million dollars (\$1,000,000) per incident.~~

~~(2) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.~~

~~(3) However, there shall not be a cause of action against an electronic mail service provider that is only involved in the routine transmission of the e-mail advertisement over its computer network.~~

~~(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.~~

~~SEC. 5.~~

~~(b) (1) (A) A recipient of an e-mail advertisement transmitted in violation of this section, an electronic mail service provider, or~~

1 *the Attorney General may bring an action against an entity that*  
2 *violates any provision of this section to recover either or both of*  
3 *the following:*

4 *(i) Actual damages.*

5 *(ii) Liquidated damages of one thousand dollars (\$1,000) for*  
6 *each e-mail advertisement transmitted in violation of this section,*  
7 *up to one million dollars (\$1,000,000) per incident.*

8 *(B) The recipient, an electronic mail service provider, or the*  
9 *Attorney General, if the prevailing plaintiff, may also recover*  
10 *reasonable attorney's fees and costs.*

11 *(C) However, there shall not be a cause of action under this*  
12 *section against an electronic mail service provider that is only*  
13 *involved in the routine transmission of the e-mail advertisement*  
14 *over its computer network.*

15 *(2) If the court finds that the defendant established and*  
16 *implemented, with due care, practices and procedures reasonably*  
17 *designed to effectively prevent e-mail advertisements that are in*  
18 *violation of this section, the court shall reduce the liquidated*  
19 *damages recoverable under paragraph (1) to a maximum of one*  
20 *hundred dollars (\$100) for each e-mail advertisement, or a*  
21 *maximum of one hundred thousand dollars (\$100,000) per*  
22 *incident.*

23 *(3) (A) A person who has brought an action against a party for*  
24 *a violation of this section shall not bring an action against that*  
25 *party under Section 17529.8 or 17538.45 for the same commercial*  
26 *e-mail advertisement, as defined in subdivision (c) of Section*  
27 *17529.1.*

28 *(B) A person who has brought an action against a party for a*  
29 *violation of Section 17529.8 or 17538.45 shall not bring an action*  
30 *against that party under this section for the same commercial*  
31 *e-mail advertisement, as defined in subdivision (c) of Section*  
32 *17529.1.*

33 *SEC. 2. No reimbursement is required by this act pursuant to*  
34 *Section 6 of Article XIII B of the California Constitution because*  
35 *the only costs that may be incurred by a local agency or school*  
36 *district will be incurred because this act creates a new crime or*  
37 *infraction, eliminates a crime or infraction, or changes the penalty*  
38 *for a crime or infraction, within the meaning of Section 17556 of*  
39 *the Government Code, or changes the definition of a crime within*

- 1 the meaning of Section 6 of Article XIII B of the California
- 2 Constitution.

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